

PADILLA v. KENTUCKY

Extending *Strickland* Rule To Noncitizen Defendant's Right to Immigration Advisory in Louisiana

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Background

Prior to *Padilla*, it was well-settled in Louisiana that deportation was a collateral consequence and accordingly the failure by a defendant's attorney to warn the defendant of the possibility of deportation was not grounds to claim ineffective assistance of counsel.² This landscape was altered on March 31, 2010 when the United States Supreme Court decided *Padilla v. Kentucky*, 130 S.Ct. 1473 (Mar 31, 2010) and thus abrogated *State v. Montalban*, 810 So.2d 1106 (La. 2002), holding that criminal defense counsel engaged in deficient performance by failing to advise a noncitizen defendant that his plea of guilty made him subject to automatic deportation.³

The defendant in *Padilla* was a native of Honduras, a lawful permanent U.S. resident and a Vietnam veteran who pleaded guilty to a drug offense. In 2001, the tractor-trailer *Padilla* was driving was stopped by police for a safety inspection and he, thereafter, allegedly consented to a search of his vehicle.⁴ The search revealed several Styrofoam boxes containing approximately 1033 pounds of marijuana.⁵ *Padilla* was charged with, *inter alia*, trafficking in marijuana and ultimately plead guilty in return for a sentence for 10 years, with five years to be served and five years to be

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² *State v. Montalban*, 810 So.2d 1106, 1110 (La. 2/26/2002) (“As applicable herein, deportation is the result of a separate civil administrative proceeding, not a consequence that the sentencing judge imposes as part of the guilty plea. . . . Because deportation is a collateral consequence of a guilty plea, it was unnecessary for defense counsel to explain that possibility to the defendant to insure that the guilty plea was free and voluntary.”).

³ The Supreme Court, Justice Stevens, held that: (1) counsel engaged in deficient performance by failing to advise defendant that his plea of guilty made him subject to automatic deportation, abrogating many state court decisions including the decision of the Louisiana Supreme Court in *State v. Montalban*, 810 So.2d 1106 (La. 2002).

⁴ Brief for Respondent at 2, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

⁵ *Id.*

probated.⁶ Padilla alleged that his counsel advised him that his 40 years as a U.S. resident would likely preclude any detrimental immigration consequences resulting from his plea of guilty by telling him that “he did not have to worry about immigration status since he had been in the country so long.”⁷ Padilla's drug conviction, however, was an aggravated felony, which is a ground for mandatory deportation.⁸ In 2004, two years after his conviction, Padilla filed a pro se post-conviction motion seeking to withdraw his plea asserting that he had received ineffective assistance of counsel, to wit: being affirmatively misadvised about the immigration consequences of his plea agreement.⁹ The trial court denied the motion but was reversed by the Kentucky Court of Appeals.¹⁰ Ultimately, a divided Kentucky Supreme Court held that since deportation was a collateral, not direct, consequence of the criminal conviction, even affirmative misadvice did not violate the Sixth Amendment because “collateral consequences are out of the scope of the guarantee of the Sixth Amendment right to counsel” and, therefore, it held “that counsel’s failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief.”¹¹ The U.S. Supreme Court had not commented directly on the issue in the past, though it had once suggested in *dicta* that, in light of the gravity of the consequence of deportation, defense attorneys should advise clients about immigration consequences.¹²

In its decision, the U.S. Supreme Court spent considerable time chronicling the way immigration law has “changed dramatically over the last 90 years,” such that “the drastic measure of deportation or removal is now

⁶ *Id.*

⁷ *Padilla*, 130 S.Ct. at 1478.

⁸ See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). Conviction of an “aggravated felony,” defined at INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), includes a wide range of offenses including drug trafficking crimes, though ironically convictions need not be either aggravated or felonies to be classified as “aggravated felonies” under the immigration law. For example, a conviction for theft with a sentence for 1 year, even if said sentence is suspended, constitutes an aggravated felony. A lawful permanent resident who is convicted of an aggravated felony is ineligible for “cancellation of removal,” the primary form of discretionary relief available for long term resident and also subjects noncitizens like Padilla to mandatory detention without a possibility of bond. INA § 236(c) provides for the mandatory immigration detention of a large class of noncitizens subjected to removal proceedings as a consequence of criminal convictions upon their release from criminal custody.

⁹ Brief for Petitioner at 11, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

¹⁰ *Id.* at 11-12.

¹¹ *Kentucky v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008).

¹² *INS v. St. Cyr*, 533 U.S. 289, 322-23 & nn. 48, 50 (2001)(“Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.”); see generally *Hill v. Lockhart*, 474 U.S. 52 (1985)(applying *Strickland* standard to plea agreements).

virtually inevitable for a vast number of noncitizens convicted of crimes.”¹³ In light of the dramatic changes in deportation law over the Twentieth Century, the Court concluded that “deportation is an integral part – indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants.”¹⁴

In light of this historical background, the Court considered the issue whether the immigration consequence was a collateral or direct consequence of a criminal conviction, and concluded that there is no clear cut distinction between the two when noncitizen defendants are involved. Recognizing that deportation is a particularly severe penalty, but it is not strictly a criminal sanction, the Court found that deportation is nevertheless intimately related to the criminal process.¹⁵ The Court therefore concluded that “[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence and that the “collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.”¹⁶

The Court then evaluated Padilla’s claim based on the two-prong *Strickland v. Washington*, 466 US 668 (1984) (“Strickland”), ineffective assistance of counsel test, not only to the extent that he alleged affirmative misadvice, but also to the extent that he alleged omissions by counsel, *i.e.* the failure to advise a defendant on the immigration consequences of a plea.¹⁷ Finding no relevant difference between an act of commission and an act of omission in this context, the Court held that both silence and affirmative misadvice are constitutionally deficient because the trial court “must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.”¹⁸ And, moreover, “[a] holding limited to affirmative misadvice would invite two absurd results because it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available, and counsel’s silence under these circumstances would be

¹³ *Padilla v. Kentucky*, 130 S.Ct. 1473, 1478 (2010) (internal citations omitted).

¹⁴ *Id.* at 1480.

¹⁵ *Id.* at 1481.

¹⁶ *Id.* at 1482.

¹⁷ *Id.* at 1484.

¹⁸ *Id.* at 1483.

fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.”¹⁹

Finding that the defense counsel’s performance fell below the accepted professional norm, the Court acknowledged the hardships that are unique and sometimes devastating to noncitizen defendants:

When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the Strickland analysis.”²⁰

As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37-38. We think the same result should follow when the stakes are not life and death but merely “banishment or exile.”²¹

The Court had also given "serious consideration" to the concerns that it was inviting a "floodgate" of litigation in light of its holding in *Padilla*.²² The Court stated, however, that it seemed unlikely its decision would have a significant impact on those convictions already obtained as the result of plea bargains because for at least 15 years "professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea".²³ The Court remanded the case to the lower court to give it an opportunity to address to whether *Padilla* had suffered prejudice by the deficiency of his attorney.

¹⁹ *Id.*

²⁰ *Id.* (citing *Hill v. Lockhart*, 474 U.S. 52, 62, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (White, J., concurring in judgment)).

²¹ *Id.* (citing *Delgado v. Carmichael*, 332 U.S. 388, 390-391, 68 S.Ct. 10, 92 L.Ed. 17 (1947)).

²² *Id.* at 1485-1486.

²³ *Id.* at 1485.

Post-Padilla Standard of Ineffective Assistance

In *Padilla v. Kentucky* the United States Supreme Court held that the Sixth Amendment mandates that criminal defense attorneys give correct advice to their noncitizen clients concerning the risk of adverse immigration consequences, particularly deportation, as a consequence of a conviction. Recognizing the complexity of immigration law, the Court stated that where the immigration consequences were uncertain a counsel's duty is more limited and “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”²⁴ Previously, the Supreme Court has assumed that competent defense counsel would be aware and advise non-citizens concerning the immigration consequences of criminal convictions and the possibility of discretionary relief from deportation.²⁵

Under Louisiana law, a criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. To prove ineffective assistance of counsel, a defendant must show both that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him.²⁶ An error is considered prejudicial if it was so serious as to deprive the defendant of a fair trial, or “a trial whose result is reliable.”²⁷ To prove prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the outcome of the trial would have been different.²⁸

Under the Sixth Amendment to the United States Constitution, defendants are guaranteed the right to the effective assistance of counsel.²⁹ The United States Supreme Court recognized the right to the effective

²⁴ *Id.* at 1483.

²⁵ See *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)(holding that new legislation abrogating possible discretionary relief from deportation could not, as a matter of fundamental fairness, be applied retroactively).

²⁶ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Soler*, 93-1042, p. 9 (La.App. 5 Cir. 4/26/94); 636 So.2d 1069, 1075, *writs denied*, 94-0475 (La.4/4/94); 637 So.2d 450 and 94-1361 (La.11/4/94), 644 So.2d 1055.

²⁷ *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064; *State v. Serio*, 94-131, p. 4 (La.App. 5 Cir. 6/30/94), 641 So.2d 604, 607, *writ denied*, 94-2025 (La.12/16/94), 648 So.2d 388.

²⁸ *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068.

²⁹ *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

assistance of counsel in relation to the entering of a guilty plea in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Similarly, the Louisiana Supreme Court stated in *State v. Beatty*, 391 So.2d 828, 831 (La. 1980), “When a defendant enters a counseled plea of guilty, this court will review the quality of counsel's representation in deciding whether the plea should be set aside.” The Court characterized the counsel's role at the guilty plea stage as “absolutely critical in assuring that the defendant is able to weigh his options intelligently.”³⁰

The U.S. Supreme Court set out the standard for proving ineffective assistance of counsel in a two-prong test in *Strickland v. Washington*.³¹ According to *Strickland*, for a defendant to show that he received ineffective assistance of counsel, he must show 1) “counsel's representation fell below an objective standard of reasonableness” and 2) “there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.”³² The U.S. Supreme Court applied this standard in the context of a guilty plea in *Hill v. Lockhart*³³. In addition to proving unreasonable performance, the defendant must also show that “there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.”³⁴ The Louisiana Supreme Court adopted the *Strickland* and *Hill* tests in *State v. Washington*.³⁵

In discussing the Strickland ineffective assistance standard, it is important to note that immigration law defines a conviction differently from the criminal law context. Under federal immigration law, a conviction exists where there has been a formal judgment of guilt entered by a court or if adjudication has been withheld, where all of the following elements are met: (1) a judge or jury has found alien guilty, or the person entered a plea of guilty or *nolo contendere* or has admitted to sufficient facts to warrant a finding of guilty; and (2) the judge has ordered some form of punishment, penalty or restraint on the person's liberty to be imposed.³⁶ Also important to note that the Illegal Immigration Reform and Immigrant Responsibility Act

³⁰ *State v. Beatty*, 391 So.2d 828, 831 (La. 1980).

³¹ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

³² *Strickland*, 466 U.S. at 687-88, 694, 104 S.Ct. 2052.

³³ *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

³⁴ *Id.* at 59, 106 S.Ct. 366.

³⁵ *State v. Washington*, 491 So.2d 1337, 1338-39 (La.1986).

³⁶ INA § 101(a)(48)(A).

of 1996 (IIRIRA) has declared that this definition of a conviction applies to convictions entered “before, on, or after” September 30, 1996, which means that the new definition of a conviction applies retroactively.³⁷ Under the IIRIRA, a “deferred adjudication” is also a conviction for immigration purposes.³⁸ Furthermore, for federal immigration law purposes, a non-citizen’s guilty plea to a removable offense may still be considered a “conviction” of a removable offense even though the guilty plea is later vacated on the ground that the defendant has been rehabilitated.³⁹

In analyzing the first prong of the *Strickland* test, whether defendant's attorney's representation fell below the standard of reasonableness, the Louisiana Supreme Court has emphasized the importance of a defendant's knowing the maximum penalty that may result from his pleading guilty. In *State ex rel. LaFleur v. Donnelly*, the Court recognized that, while it is important to explain to the accused the elements of the offenses of which he is charged, as well as the rights he will waive by pleading guilty, it is probably more important to the defendant's decision to plead guilty that he understand the maximum penalty exposure.⁴⁰ In *LaFleur*, defendant's attorney erroneously informed him that if he pled guilty and accepted a six year plea bargain, he would be eligible for parole after two years. The Louisiana Supreme Court found that defendant was justified in believing that he would be eligible for parole in two years and that he pleaded guilty based in part on that misconception. As a result, while defendant's guilty plea was voluntary, it was not knowingly and intelligently entered.⁴¹ Similarly in *State ex rel. Curry v. Guillory*, the Louisiana Supreme Court remanded a defendant's case to the district court, allowing him to withdraw his guilty plea because his attorney advised him to enter the plea under the mistaken impression that defendant would serve a maximum of two-years.⁴² In reality, the plea would also have automatically caused revocation of his parole on a prior conviction, and caused the need to serve an additional eight years in prison.

³⁷ IIRIRA § 322.

³⁸ *Matter of Punu*, 22 I&N dec. 224 (BIA 1998)(finding Texas deferred adjudication constitutes an conviction and that the new definition of a conviction applied retroactively).

³⁹ *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). For further discussion of a conviction for immigration law purposes, see Kesselbrenner & Rosenberg, *Immigration Law and Crimes*, §2:1-2:11 (2010).

⁴⁰ *State ex rel. LaFleur v. Donnelly*, 416 So.2d 82, 84 (La. 1982),

⁴¹ *Id.*

⁴² *State ex rel. Curry v. Guillory*, 441 So.2d 204 (La. 1983).

The reasonableness of an attorney's representation is a question of fact to be determined on a case-by-case basis. In analyzing the reasonableness of the representation, a court should consider whether defendant's counsel knew or should have known that deportation was a serious concern of the client's, and should also consider the attorney's treatment of that concern when advising his client, including whether the attorney failed to provide his client with information or, on the other hand, provided his client with incorrect information. However, because the reasonableness of defendant's attorney's representation is a fact-intensive question, and the court should provide an opportunity to present evidence relating to this issue in an evidentiary hearing.

Next, according to the second prong of the *Strickland* and *Hill* tests, a finding that defendant's attorney's representation fell below the standard of reasonableness does not render the attorney's performance constitutionally ineffective without a finding of prejudice to the defendant. Based on this, in order to prove ineffective assistance of counsel, along with proving the unreasonableness of his attorney's representation, defendant also must prove that, had his attorney advised him of the possible deportation proceedings, he would not have pleaded guilty and would have insisted on going to trial. Several courts have held that an attorney has a duty to advise a client of the immigration consequences of a guilty plea.⁴³

As emphasized by Justice Calogero, in his dissent in *State v. Montalban*, the significance of the possibility of deportation may be different in every case, however, deportation may well be more severe than a prison sentence, or a suspended prison sentence, and may result in separation from family or in the "loss of property or life; or of all that makes life worthwhile."⁴⁴

Retroactivity under Teague v. Lane

The important issue presented by *Padilla* is whether the rule of law announced in *Padilla* applies retroactively to a collateral challenge to a guilty

⁴³ See *Wallace v. Reno*, 24 F.Supp.2d 104, 110 (D.Mass.1998); *Mojica v. Reno*, 970 F.Supp. 130, 177 (E.D.N.Y.1997); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *Williams v. State*, 641 N.E.2d 44, 48-49 (Ind.Ct.App.1994).

⁴⁴ *State v. Montalban*, *supra*, at 1112 (citing *Williams v. State*, 641 N.E.2d 44, 49 (Ind.App. 5 Dist.1994)); See also *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938 (1922)).

plea. Initially, the court must determine whether the rule announced in *Padilla* is a new rule of law which is generally applicable only to cases still on direct appeal.⁴⁵ The Court recognized that *Padilla* merely applied the old rule described in *Strickland* to a specific set of facts, which implies that noncitizen defendant's *Padilla* claim applies retroactively.⁴⁶

It is true that controlling precedent in Louisiana and many other jurisdictions previously labeled immigration consequences as collateral matters to a criminal conviction, and therefore, lack of advice regarding these was not generally cognizable under a claim of ineffective assistance of counsel.⁴⁷ However, the existence of conflicting authority does not resolve whether the Supreme Court announced a new rule.⁴⁸ The U.S. Supreme Court stated that “[i]f the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.”⁴⁹ Furthermore, when the Supreme Court applies an established rule of law in a new way based on the specific facts of a case, it generally does not create a new rule.⁵⁰ The Supreme Court thus merely applied *Strickland's* well-established test to determine whether Padilla's counsel's performance was objectively reasonable and therefore did not announce a new rule of law.⁵¹

In *Padilla*, the Supreme Court reiterated their rejection of the distinction between collateral and direct consequences to define the scope of effective assistance of counsel and pointed out that for at least 15 years prevailing professional norms have required that defense counsel advise their clients regarding deportation and discuss other possible immigration consequences.⁵² The Supreme Court seems to understand its holding in *Padilla* would apply retroactively when it stated that it had “given serious

⁴⁵ *Griffith v. Kentucky*, 479 U.S. 314 (1987).

⁴⁶ *Padilla*, 130 S.Ct. at 1485 n. 12.

⁴⁷ *State v. Montalban*, *supra.*; see *People v. Ford*, 86 N.Y.2d 397 (1995); *Kentucky v. Padilla*, 130 S.Ct. 1473, 1481 (2010)(see collected cases in footnote 9).

⁴⁸ see *Wright v. West*, 505 U.S. 277 (1992).

⁴⁹ *West*, 505 U.S. at 308-09.

⁵⁰ see *Stringer v. Black*, 503 U.S. 222 (1992).

⁵¹ see *Teague v. Lane*, 489 U.S. 288 (1989); *Butler v. McKellar*, 494 U.S. 407 (1990); *People v. Eastman*, 85 N.Y.2d 265 (1995). There is a conflict among courts as to whether *Padilla* announced a new rule. See, e.g., *People v. Kabre*, 2010 N.Y. Slip Op 20291 (Crim. Ct. New York County, 2010)(finding *Padilla* did announce a new rule but that it does not apply retroactively on collateral review).

⁵² See *Padilla*, 130 S.Ct. at 1482-1483.

consideration” to the argument that its ruling would open the “floodgates” to new litigation challenging prior guilty pleas.⁵³ The Supreme Court minimized the “floodgates” concern by recognizing that guilty pleas are advantageous bargains and that, under the second prong of *Strickland*, a petitioner must “convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”⁵⁴ Although *Padilla* overruled some precedent, and the Supreme Court's statement that it “now hold[s] that counsel must inform her client whether his plea carries a risk of deportation” may be interpreted to indicate that the Court intended to create a new rule, the legal analysis throughout *Padilla* employed the long established standard set forth in *Strickland* and not a new rule of law.⁵⁵

The two pivotal cases addressing the retroactive effect of new decisions dealing with constitutional criminal procedure are *Teague v. Lane* and *People v. Eastman* which adopted the Teague retroactivity analysis and its progeny.⁵⁶ Under *Teague*, a retroactivity analysis turns on whether a decision announced a “new rule” of criminal procedure or merely applied an “old rule” in a new context. An old rule is to be applied on both direct and collateral review.⁵⁷ “[W]hen a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an ‘old’ rule, and is always retroactive.”⁵⁸

While it is clear that when a Court overturns its own precedent, a new rule is established,⁵⁹ it is more difficult to determine whether a Court is announcing a new rule when a decision extends the reasoning of its prior cases.⁶⁰ The *Teague* Court explained, however, that generally “a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government,” but it can hardly be said that recognizing the right to effective counsel “breaks new ground . . .”⁶¹ “To put it differently, a case announces a new rule if the result was not dictated

⁵³ *Id.* at 1484-85.

⁵⁴ See *Padilla*, 130 S.Ct. at 1485 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)).

⁵⁵ *Padilla*, 130 S.Ct. at 1486,

⁵⁶ *Teague v. Lane*, 489 U.S. 288 (1989); *People v. Eastman* 85 NY2d 265 (1995).

⁵⁷ See *Whorton v. Bockting*, 549 US 406, 416 (2007).

⁵⁸ *People v. Eastman*, 85 NY2d at 275 (citing *Yates v. Aiken*, 484 US 211, 216 (1988)).

⁵⁹ See *Saffle v. Parks*, 494 US 484, 488 (1990).

⁶⁰ *Id.*; *Teague*, 489 US at 301.

⁶¹ *Williams v. Taylor*, 529 US 362, 391 (2000)(quoting *Teague* at 301).

by precedent existing at the time the defendant's conviction became final."⁶² Moreover, the U.S. Supreme Court has stated that the mere existence of conflicting authority does not necessarily mean a rule is new.⁶³

The federal Fifth Circuit jurisprudence also provides support for the retroactive application of *Padilla*. In *Burdine v. Johnson*, United States Court of Appeals for the Fifth Circuit considered a writ of habeas corpus filed by a criminal defendant who was convicted and sentenced to death for capital murder in Texas.⁶⁴ The petitioner argued that he was denied effective assistance when his counsel repeatedly slept during guilt-innocence phase of trial in 1984. The United States District Court for the Southern District of Texas, concluding that “sleeping counsel is equivalent to no counsel at all” and granted relief and government appealed.⁶⁵ A divided panel of the Fifth Circuit reversed, holding that (1) the district court’s presumption of prejudice for purposes of ineffective assistance constituted a new rule of law from which Burdine could not benefit under *Teague*’s nonretroactivity doctrine,⁶⁶ and (2) the circumstances of Burdine’s representation did not require a presumption of prejudice to ensure the fairness of Burdine’s capital murder trial.⁶⁷ On rehearing en banc, the Fifth Circuit vacated the panel opinion and affirmed the District Court’s decision, holding that: (1) claim that Sixth Amendment required presumption of prejudice when counsel slept repeatedly during trial was not barred by non-retroactivity principles of *Teague*, and (2) counsel's sleeping warranted presumption of prejudice. The Court found that the Supreme Court’s Sixth Amendment jurisprudence compels the presumption that counsel’s unconsciousness prejudiced the defendant when there was credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant.

At the time that Burdine's conviction became final in 1987, it was well established in the legal landscape that defendants have the Sixth Amendment right to effective assistance of counsel at every critical stage of the

⁶² *Id.*

⁶³ See *Williams v. Taylor* at 410; *Wright v. West*, 505 US 277 304 (1992).

⁶⁴ *Burdine v. Johnson* 262 F.3d 336 (5th 2001).

⁶⁵ 66 F.Supp.2d 854.

⁶⁶ *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

⁶⁷ See *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000).

proceedings against them.⁶⁸ The purpose of this Sixth Amendment guarantee was and “is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”⁶⁹ Because the Sixth Amendment serves solely to ensure a fair and reliable trial, “any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”⁷⁰ Both the U.S. Supreme Court and the Fifth Circuit, however, have recognized that the absence of counsel at critical stages of a defendant’s trial undermines the fairness of the proceeding and therefore requires a presumption that the defendant was prejudiced by such deficiency.⁷¹

In *Teague*, a majority of the U.S. Supreme Court adopted a view of retroactivity that a new rule of law would not be applied on collateral review to cases that became final prior to the announcement of the new rule.⁷² However, *Teague* offered the following general guidelines:

[A] case announces a new rule when it breaks new ground or imposes a heretofore new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the petitioner’s conviction became final.⁷³

Shortly thereafter, the U.S. Supreme Court in *Penry v. Lynaugh* adopted the *Teague* doctrine and analyzed the distinction between a new rule under *Teague* and an application of established principles to a case that is analogous to prior precedent.⁷⁴ Penry claimed that his Eighth Amendment rights were violated because the jury in his capital murder trial was unable to

⁶⁸ See *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932)(defendant “requires the guiding hand of counsel at every step in the proceedings against him.”).

⁶⁹ *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046 (“[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”).

⁷⁰ *Id.*

⁷¹ See *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984); *Strickland v. Washington*, *United States v. Russell*, 205 F.3d 768, 770-771 (5th Cir. 2000).

⁷² *Teague*, 489 U.S. at 310, 109 S.Ct. at 1075.

⁷³ 489 U.S. at 301, 109 S.Ct. at 1070 (emphasis original).

⁷⁴ *Penry v. Lynaugh*, 492 U.S. 302, 316, 109 S.Ct. 2934 (1989).

fully consider and give effect to mitigating evidence of his mental retardation and childhood abuse when answering Texas’ three statutory special issues at sentencing. Penry did not facially challenge the Texas death penalty statute but instead, he claimed that “*on the facts of [his] case, the jury was unable to fully consider and give effect to the mitigating evidence . . . in answering the three special issues.*”⁷⁵ The State argued that Penry asserted rule amounted to an extension of established principles and consequently was barred by *Teague*. The Court was thus faced with determining whether the rule asserted by Penry was an application of established principles or a new rule of law.

Prior to 1986, when Penry’s conviction and sentence became final, the Supreme Court had established that “in capital cases the fundamental respect for humanity underlying the Eight Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”⁷⁶ The Supreme Court concluded that despite the absence of a specific holding requiring the instruction sought by Penry, the rule Penry sought to benefit from was dictated by the Eight Amendment principles espoused and enforced in the Court’s prior cases. In other words, the rule Penry sought – a requirement that the jury be instructed specifically what mitigating evidence it should consider and how it should consider that evidence when answering Texas’ special issues – was not “new” for the purposes of *Teague* because it represented a specific application of general Eight Amendment principles outlined in prior analogous cases. Moreover, the rule did not impose a new obligation on Texas, it simply required that Texas fulfill its obligation to ensure “that the special issues [of the Texas capital punishment statutes] would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant

⁷⁵ 492 U.S. at 315, 109 S.Ct. at 2945 (emphasis added).

⁷⁶ See *Penry*, 492 U.S. at 316, 109 S.Ct. at 2945 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976)). The Court had stressed this fundamental principle in upholding Texas’ capital punishment statute in a case in which a defendant made a facial challenge. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976). After *Woodson* and *Jurek* but before *Penry*’s conviction became final, the Supreme Court reaffirmed the need for an individualized assessment of the appropriateness of the death penalty under the Eight Amendment. See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982).

might present in imposing sentence.”⁷⁷ The application of established general procedural principles in an analogous context is not a new rule barred by *Teague* remains the law of the land today.⁷⁸ The Fifth Circuit held that “[j]ust as *Teague* did not prevent Penry from receiving the benefit of established Eighth Amendment protections, it does not prevent Burdine from receiving the benefit of established Sixth Amendment protections.”⁷⁹

The Fifth Circuit’s retroactivity analysis in *Burdine* and *Penry* is instructive in determining whether *Padilla* applies retroactively in Louisiana. According to both decisions, a strong argument can be made that *Padilla* is retroactive, as it did not create a new rule, despite the fact that in Louisiana deportation was considered merely a collateral consequence. *Padilla* only applied its *Strickland* precedents to a new set of facts because it is well established in the legal landscape that defendants have the Sixth Amendment right to effective assistance of counsel at every critical stage of the proceeding against them.⁸⁰

In sum, the *Padilla*'s majority opinion holds that, since the severe changes affecting immigration law in recent years, the *Strickland* standards have not been met where defense attorneys failed to give correct advice to clients in criminal cases facing deportation, when the immigration consequences were readily ascertainable, as they were in *Padilla*. Since *Padilla* did not announce a new constitutional rule, but merely applied the well-settled rule in *Strickland* to a particular set of facts, and the decision did not expressly overrule a clear past precedent, according to the Fifth Circuit jurisprudence, the *Padilla* rule should apply retroactively to the convictions arising out of Louisiana, whether misadvice or no advice at all because deportation was such a devastating result "intimately related to the criminal process"⁸¹

⁷⁷ *Penry*, 492 U.S. at 317, 109 S.Ct. at 2946

⁷⁸ See *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610 (1998)(rejecting the argument that the petitioner’s claim that his guilty plea was not knowing and intelligent was barred by *Teague* in part because “[t]here is surely nothing new about this principle ...”).

⁷⁹ *Burdine*, 262 F.3d at 344.

⁸⁰ See *Powell*, 287 U.S. at 69, 53 S.Ct. at 64.

⁸¹ see *Padilla*, 130 S.Ct 1473 n. 12.; see also *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000)(applying *Strickland* test does not create a new rule of constitutional law and can be applied retroactively).

Showing of Prejudice

According to *Padilla*, merely advising a client to seek outside immigration advice, without more, now fails to meet the affirmative duty at least where the immigration implications of the plea were fairly straightforward, as was the situation in *Padilla*. The first prong of the *Strickland* test requires the defendant to “show that counsel's performance was deficient” and “fell below an objective standard of reasonableness.”⁸² However, meeting this first prong is not enough to win a *Padilla* claim. The second prong of the *Strickland* test, also known as the “prejudice” prong, requires the defendant to show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”⁸³ In the context of an ineffective assistance of counsel claim regarding a guilty plea, however, the prejudice prong more specifically requires the defendant to show that “there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.”⁸⁴

The Court must decide whether defendant suffered prejudice under the second prong of *Strickland*.¹⁷ There may be an argument, for example, that defendant has not demonstrated he suffered such prejudice since he received the benefit of a very favorable plea bargain, thereby avoiding a real risk of a long term of imprisonment and ultimate automatic deportation, that defendant most likely could have avoided any immigration consequences by his guilty plea because ICE enforcement is sporadic for those defendants who have received non-jail sentences, or that the evidence against defendant was overwhelming and therefore it is not credible that defendant would have opted to go to trial even if he was appropriately apprised of the immigration consequence. The court can reject these arguments and find from all the circumstances of the plea, because, even if all the above conditions are present, there is no difference in terms of the immigration consequences if defendant would not have pleaded guilty but for the deficiencies in the representation by his counsel. However, the *Padilla* claimant must still convince the court that a decision to reject the plea bargain would have been

⁸² *Id.* at 687-688, 104 S.Ct. 2052; *People v. McDonald*, 1 N.Y.3d 109, 113, 769 N.Y.S.2d 781, 802 N.E.2d 131 (2003)(which is “essentially a restatement of attorney competence”).

⁸³ *Id.* at 694, 104 S.Ct. 2052.

⁸⁴ *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see also McDonald* at 114, 769 N.Y.S.2d 781, 802 N.E.2d 131.

rational under the circumstance.⁸⁵ As the determination of prejudice is fact intensive, at a minimum, a noncitizen defendant should be provided an opportunity in the form of an evidentiary hearing during which he can present specific evidence of prejudice.

Conclusion

By placing an explicit Sixth Amendment duty on defense counsel, and implicitly to prosecutors and the judges, to advise noncitizen defendants regarding potential immigration consequences, the *Padilla* decision will dramatically alter the representation of immigrant defendants. The Court strongly implied that its decision also is retroactive because “professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.”⁸⁶ *Padilla*, however, should not be viewed as placing too much of a burden of the defense counsel. As Justice Stevens noted, the consequence of a criminal conviction for a noncitizen could be a permanent separation from his or her families, or worse, death.⁸⁷ At the same time, the *Padilla* decision gives counsel new tools with which to advocate for their clients, and introduces greater transparency and fairness into the plea process. If there is uncertainty about which collateral consequences may qualify for a *Padilla* advisory, all actors involved in the system including prosecutors and judges as well as defenders will have an incentive to familiarize themselves with the array of laws and rules affecting people with a criminal record. In the end, the *Padilla* decision should be interpreted in a way that, when a noncitizen defendant is involved, all parties in the criminal justice system are encouraged to work toward reaching a just result because “strong consideration of possible deportation can only benefit both the State and noncitizen defendants [during the plea bargaining process].”⁸⁸

⁸⁵ See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

⁸⁶ *Padilla*, 130 S.Ct. at 1485; See also *Teague v Lane*, 489 U.S. 288 300-02 (1989).

⁸⁷ *Id.* at 1483.

⁸⁸ *Id.* at 1486.